No. 17-1702

IN THE

Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION, DANIEL COUGHLIN, JEANETTE SANTIAGO, CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK, JESUS PAPOLETO MELENDEZ,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in rejecting this Court's state actor tests and instead creating a *per se* rule that private operators of public access channels are state actors subject to constitutional liability.

2. Whether the Second Circuit erred in holding—contrary to the Sixth and D.C. Circuits—that private entities operating public access television stations are state actors for constitutional purposes where the state has no control over the private entity's board or operations.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan, public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences; publishes books, studies, and the annual *Cato Supreme Court Review*; and files *amicus* briefs.

Consistent with its values, Cato believes that the Bill of Rights, including the First Amendment, must be preserved as a safeguard against government infringements on individual liberties, rather than used to burden private citizens in the resolution of their disagreements with other private citizens. The Second Circuit's expansive view of "state action" and "public forum" improperly treats private parties as creatures of the state.

SUMMARY OF ARGUMENT

The Petition squarely presents an important question that this Court left open more than 20 years ago: whether private operators of public access cable channels can be held liable as state actors on the ground that they oversee public forums. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, a plurality of the Court thought it

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[1] Pursuant to Rule 37.2(a), counsel for all parties received timely notice of amicus's intent to file this brief, and consented in writing. No counsel for any party authored this brief in any part; no person or entity other than amicus or its counsel made a monetary contribution to fund its preparation or submission.

"premature" to decide an integral part of that question—*i.e.*, whether public access channels are public forums subject to the First Amendment's bar on government abridgement of speech. 518 U.S. 727, 742 (1996). Because the federal statutory provisions at issue in that case undeniably were state action regulating speech, the justices in the plurality resolved the case on other grounds. *Id.* at 743. The other five justices split on the question of whether public access channels are public forums. *Id.* at 791 (Kennedy, J., concurring in part, concurring in the judgment in part, dissenting in part); *id.* at 826 (Thomas, J., concurring in the judgment in part, dissenting in part).

This case removes the obstacle that the plurality invoked in *Denver Area*. No federal statute provides the state action needed to support Respondents' claim that their First Amendment rights were violated. Instead, the lower court's decision to let such a claim go forward rested squarely on the twin holdings that public access channels are public forums, and private entities operating them are state actors. More than 20 years having passed since the *Denver Area* plurality declared the dispute "premature," the time has come for the Court to settle the matter.

Left uncorrected, the decision below will engender confusion and unnecessary risk of liability for privately owned businesses. Among other errors, the court of appeals created a spurious and untenable distinction between leased access channels and public access channels. The court reasoned that leased access channels exist "'to promote competition' with commercial channels," while "[t]he explicit purpose of public access channels was to give the public an enhanced opportunity to express its views." Pet. App.

15a. But the line separating private parties from state actors does not dissolve just because a state or municipality has an arguably altruistic reason for requiring private property owners to let others use their private property.

Public discourse best flourishes when state regulation of speech is defined to mean regulation *by* the state—not private action that the state makes possible. Placing careful limits on the state's power to regulate speech results in more free speech—the central goal of the First Amendment's protections. *See Citizens United v. FEC*, 558 U.S. 310, 361 (2010) ("[I]t is our law and our tradition that more speech, not less, is the governing rule."). Similarly, public discourse is fostered by a clearly defined and carefully cabined definition of state action. Only conduct "fairly attributable" to the state meets the definition. Private actors who make their own decisions about how their property is used by other speakers should not face liability as if they were vessels of the state.

The lower court's error in treating private parties as state actors could easily extend beyond cable carriers. The court's reasoning—that the designation of a private company to operate a public forum can turn the company into a state actor—logically applies to other media operators too, such as Internet service and content providers. Indeed, claimants across the country already have sought to impose constitutional liability on such providers under expansive theories of what public forums and state action encompass. This case presents an opportunity for the Court to reaffirm the need for "[c]areful adherence to the 'state action' requirement." *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

ARGUMENT

I. THE QUESTIONS PRESENTED IN THE PETITION ARE RIPE FOR—AND IN NEED OF—RESOLUTION

This Court should not further delay its resolution of the questions presented in the Petition. This case is a proper vehicle for deciding whether private operators of public access cable channels are state actors who oversee public forums, an important issue left undecided 22 years ago in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). Moreover, the Second Circuit's attempt to resolve the question has resulted in a spurious and untenable distinction between leased access channels and public access channels.

A. This Case Properly Presents the Question Left Undecided in *Denver Area*

The key distinction between this case and *Denver Area* is that the latter dealt with a federal statute that regulated a category of speech. Thus, the federal government was a state actor for First Amendment purposes. Here, however, Respondents challenge no state action by the federal government—only actions of Petitioners. Thus, this case squarely presents questions that the Court had no cause to reach in *Denver Area*.

Denver Area addressed First Amendment challenges to three provisions of the Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1486, §§ 10(a), 10(b), 10(c). Between 1984 and that statute's enactment in 1992, "federal law

(as had much pre-1984 state law, in respect to public access channels) prohibited cable system operators from exercising *any* editorial control over the content of any program broadcast over either leased or public access channels." *Denver Area*, 518 U.S. at 734. Congress passed the 1992 Act to "regulate the broadcasting of 'patently offensive' sex-related material on cable television." *Id.* at 732. The first provision "permit[ted]" cable operators to prohibit "patently offensive" material on leased access channels. *Id.* at 734. The second provision "require[d]" those operators that "decide[d] to permit" such programming "to segregate and to block similar programming" on leased access channels. *Id.* at 735. The third provision instructed the Federal Communications Commission ("FCC") to promulgate regulations that would "enable a cable operator" to "prohibit" "sexually explicit conduct" on public access channels. *Id.* The FCC's regulations implementing the third provision defined "sexually explicit" as content that was "patently offensive." *Id.* at 736. This Court upheld the first provision but struck down the latter two as violating the First Amendment. *Id.* at 768.

This Court's members disagreed over the need to decide whether public access channels are public forums. State action indisputably was at issue, since the "petitioners attack[ed] (as 'abridg[ing] . . . speech') a congressional statute—which, by definition, is an Act of 'Congress.'" *Denver Area*, 518 U.S. at 737 (plurality opinion) (second alteration and ellipsis in original); *see also id.* at 782 (Kennedy, J., concurring in part, concurring in the judgment in part, dissenting in part) ("The plurality at least recognizes this as state action, avoiding the mistake made by the Court of Appeals . . . ." (citation omit-

ted)). A plurality of justices thus thought it "premature to answer . . . whether public access channels are a public forum" and "whether exclusion" of certain speech "from common carriage must for all purposes be treated like exclusion from a public forum." *Id.* at 742. "Rather than decide these issues," the plurality chose to "decide the[] case[] more narrowly." *Id.* at 743.

That more narrow route was to "scrutinize" whether Congress's regulation of speech "properly addresse[d] an extremely important problem," which was "the need to protect children from exposure to patently offensive sex-related material." *Id.* The third provision did not properly address the problem because "the public/nonprofit programming control systems" already governing public access channels "would normally avoid, minimize, or eliminate any child-related problems concerning 'patently offensive' programming." *Id.* at 763–64. Thus, "th[e] third provision violate[d] the First Amendment." *Id.* at 766.

Justices Kennedy and Ginsburg agreed that the third provision violated the Constitution but would have held that "[p]ublic access channels meet the definition of a public forum." *Id.* at 791 (Kennedy, J., concurring in part, concurring in the judgment in part, dissenting in part). Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, would have held that "[p]ublic access channels are not public forums" and that the third provision was constitutional. *Id.* at 831 (Thomas, J., concurring in the judgment in part, dissenting in part).

The Petition presents an opportunity to address the questions left unanswered in *Denver Area*. Unlike in that case, Respondents' claims here do not

challenge the government's regulation of any speech (such as the patently offensive sex-related material at issue in *Denver Area*). Instead, Respondents challenge the conduct of private actors, who decided (without involvement by the government) whether to host Respondents' speech. Thus, the decision below squarely reached the issue left open 22 years ago in *Denver Area*, holding that "public access TV channels in Manhattan are public forums and that [Petitioner MNN's] employees were sufficiently alleged to be state actors." Pet. App. 3a. This Court can correct those erroneous conclusions by taking up the questions that *Denver Area* did not resolve.

B. The Second Circuit Has Created a Spurious and Untenable Distinction Between Leased Access Channels and Public Access Channels

The decision below, when combined with the Second Circuit's earlier decision in *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256 (2d Cir. 1999), creates an indefensible distinction between leased access and public access channels.

Federal law requires a private cable operator "to allocate a certain percentage of its system's capacity for leased access channels," meaning "channels for commercial use by programmers not affiliated with the cable operator." *Loce*, 191 F.3d at 265. In *Loce*, the Second Circuit considered the constitutionality of a cable operator's "Indecency Policy," which provided that "programmers who submitted indecent or obscene material for cablecast could lose their eligibility to obtain or retain leased access channel

capacity on the [operator's] system." *Id.* at 260. The cable operator had suspended the plaintiffs from submitting content on leased access channels because they violated the Indecency Policy. The plaintiffs sued the operator for alleged First Amendment violations. *Id.* at 261–62.

Like here, the primary issue in *Loce* was whether the cable operator was a state actor and therefore subject to the First Amendment's bar on abridging free speech. *Id.* at 267. The Second Circuit held that it was not: "The fact that federal law requires a cable operator to maintain leased access channels and the fact that the cable franchise is granted by a local government are insufficient, either singly or in combination, to characterize the cable operator's conduct of its business as state action." *Id.*

The decision below distinguished *Loce* on the spurious ground that it "concern[ed] leased channels, not public access channels." Pet. App. 15a. Whereas "Congress required leased channels in order 'to promote competition' with commercial channels 'in the delivery of diverse sources of video programming,'" "[t]he explicit purpose of public access channels was to give the public an enhanced opportunity to express its views." *Id.* In other words, a private party becomes a state actor (or not) depending on the precise purpose the government articulates when it requires a private party to let others use its property. If the government says it seeks to increase diversity of speech by "promot[ing] competition" between leased channels, the private entity running the cable channel is not a state actor. But if the government says it wants to increase

diversity of speech by promoting public access to non-leased channels, the private party *is* a state actor.

There is no basis in law or logic for a private party's liability as a state actor to turn on the reason the government gives for requiring the private party to open its property to use by others. As the dissenting judge explained, "[c]able operators are equally obligated to provide both 'forums.'" Pet. App. 28a (Jacobs, J., concurring in part and dissenting in part). "And in both instances the operators"—the companies that own the cable system itself—"are prohibited by law from exercising editorial control." *Id.* The different means the government uses to promote diversity of speech—*i.e.*, requiring some channels to be leased and others to be provided without charge—is a distinction without a difference.

It is also a distinction with unfair consequences. The decision below adds insult to injury by holding that *because* the government forbids a cable operator from charging fees for access to certain channels, the private entities that run those channels are saddled with the added burden of expanded civil liability.

II. THIS COURT'S PRECEDENTS COMMAND CAREFUL ADHERENCE TO THE "STATE ACTION" REQUIREMENT

The First Amendment scrupulously protects the citizenry from laws abridging the freedom of speech. When courts appropriately limit government regulation of speech, the result is more speech. Courts must be equally cautious in determining what constitutes state regulation of speech. Private parties have a right not only to speak without fear of government

interference, but also to decide who uses their property as a vehicle for expression. Limiting the definition of state action to representatives of the state also results in more speech.

A. Minimal, Clearly Defined State Regulation of Speech Results in More Speech

The First Amendment embodies the axiom that public discourse is best able to flourish when state regulation of speech is minimal and clearly defined. As Justice Douglas put it, when "the Government is the censor" of speech, then "administrative fiat, not freedom of choice, carries the day." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 153 (1973) (Douglas, J., concurring in the judgment). On the other hand, when speakers have no reason to fear liability for their speech, the result is more speech—the central goal of the First Amendment's protections. *See Citizens United v. FEC*, 558 U.S. 310, 361 (2010) ("[I]t is our law and our tradition that more speech, not less, is the governing rule."); *Texas v. Johnson*, 491 U.S. 397, 419 (1989) ("If there be time to expose through discussion . . . falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring))); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) ("[M]ore speech . . . [is] among the central goals of the Free Speech Clause.").

These principles apply to speech occurring on both public and private property. "Robust protections for just possessory rights ground and enable participation in the ecosystem of expression." Gary

Chartier, *An Ecological Theory of Free Expression* 13 (2018). This is because "[p]ossessory rights determine who will have the right to speak where and using what media." *Id.* at 21. When the state properly limits its role to protecting property rights, "[p]eople's right to control their justly acquired possessions provides a powerful safeguard against interference with expressive activity." *Id.* at 14.

By extension, when state regulation of property is minimal and clearly defined, property owners flourish. *See* Timothy Sandefur, *Cornerstone of Liberty: Property Rights in 21st Century America* 17 (2006) ("People flourish only in societies where they can keep the things they earn and create a sphere of personal autonomy in which they can be themselves."). In that situation, owners make use of their property in valuable and inventive ways without fear of liability. *Id.* at 19 ("[P]rivate property . . . is enormously beneficial to society—particularly to those who are least well off—because those who own surplus capital can invest it in experimental new enterprises that raise the standard of living and create jobs.").

B. Careful Limitation of the Meaning of "State Action" to State Actors Likewise Encourages More Speech

Just as courts should zealously protect speech from state abridgment, so should courts be cautious about mischaracterizing private conduct as state abridgment of speech. Exposing private parties to civil liability for their speech-related actions discourages free speech. Such a result is antithetical to the aims of the First Amendment.

As the plurality in *Denver Area* stated, "We recognize that the First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech . . . ." 518 U.S. at 737. In order to minimize "constitutional doubt," courts must consistently limit constitutionality liability to those persons meeting a narrow and carefully tailored definition of state actor. "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law . . . ." *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988).

The decision below failed to adhere carefully to the state action requirement. First, the panel majority failed to "apply any of this Court's state actor tests—the public function test, the compulsion test, or the joint action test—in concluding that MNN is a state actor." Pet. 15–16. Instead, the majority expanded the definition of state action by holding that public access channels are public forums because the federal government required that the channels be set aside, and a municipal official—the Manhattan Borough President—chose which private party would run those channels. Pet. App. 13a–14a. And although the "state action" requirement "usually" is satisfied with the *added* showing that the "public forums" are "operated by governments," the court dispensed with that need here on the ground that the same fact—a borough president's designation of MNN as operator of the channel—creates a "sufficient connection to governmental authority" for MNN and its employees "to be deemed state actors." Pet. App. 14a–15a. The majority's only authority for the first proposition—that a public

access channel is a public forum—was Justice Kennedy's concurrence in *Denver Area*. *Id.* at 13a. The majority cited no authority at all for the second proposition—that a government official's choice of the operator of a public access channel makes that operator a state actor.

This cannot even be called "adherence," let alone "*careful* adherence," to the state action requirement as outlined by this Court's precedents. This case presents the Court an opportunity to reaffirm the need for such adherence, thus preserving individual freedom and resulting in more speech.

It is no defense that expanding civil liability under 42 U.S.C. § 1983 for some private parties (*e.g.*, Petitioners) will expand the speech options for others (*e.g.*, Respondents). After all, there are countless contexts in which one could try to justify burdening one private party to give another private party greater opportunities to speak. Yet never before has this Court allowed the First Amendment to be used as a tool by some to advance their own interests at the expense of other private parties. Moreover, the same freedom of expression that allows a property owner to pick and choose among those who might use his soapbox is the same freedom that permits speech to flourish in countless other venues. Indeed, in at least some cases, a censored speaker will be able to express the same message to the same audience by other means. To quote again from Justice Douglas, "for one publisher who may suppress a fact, there are many who will print it." *CBS*, 412 U.S. at 153

(Douglas, J., concurring in the judgment).[2] The overall result is more speech.

III. THE ERRONEOUS DECISION BELOW COULD HAVE UNINTENDED FAR-REACHING CONSEQUENCES FOR OTHER PLATFORMS AND MEDIA

The lower court's erroneous formulation of the state action requirement threatens operators of other media with expanded liability. While all speakers benefit from careful judicial adherence to the state actor requirement, it is especially important for newer industries where regulatory uncertainty is often the mortal enemy of investment, development, and growth. The lack of clarity generated by the court of appeals—especially in light of where *this* court of appeals sits—could be particularly problematic for new media, including digital and web-based companies.

The Second Circuit broadly reasoned that the mere fact "that the Manhattan Borough President designated MNN to run the public access channels" creates "a sufficient connection to governmental authority" for "employees of MNN" "to be deemed state actors." Pet. App. 14a–15a. The panel also held that the same designation of MNN—in combination with the government requirement that public access channels be set aside in the first place—renders such channels public forums. *Id.* at 13a–14a. Neither of these holdings comports with the accepted frame-

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[2] That is all the more true in the 21st century, where other private and public means of access abound. *See, e.g.*, Pet. 5 (noting that Respondents' video is available on YouTube).

work for defining state actors *or* public forums. Instead, these criteria are broad enough to ensnare nearly any entity that partners with a government body to run a service made available to the public.

Internet service providers, social media websites, and other similar private companies are directly affected by the uncertainty that the decision below wreaks. Many of these companies have developed business models that rely on providing open platforms, available to all, much like the reach of public access channels. Some companies have even specifically sought to partner with municipalities to provide communities with access to the Internet. The Second Circuit's holding risks subjecting these types of businesses to the full force of liability as state actors, undermining their own right to decide which content to provide or how to operate their service.

To take one example, numerous localities throughout the United States have already contracted with private enterprises to deliver broadband and television services. *See, e.g.*, City of Lincoln, Nebraska, *Lincoln Fiber to Home Project Overview*, https://lincoln.ne.gov/city/mayor/cic/cable/pdf/project-overview.pdf; Danielle Smoot, *KentuckyWired Statewide Broadband Network Initiative Moving Forward in Eastern Kentucky and Beyond*, https://bit.ly/2L91vfM. This Court should be loath to let stand a rule that potentially unleashes Section 1983 liability on private actors as the payoff for working alongside municipal or state governments to deliver Internet access to communities in need. Nor should these providers be put to the Hobson's choice of being forced to deliver objectionable content or no content at all.

Certainly such a rule would conflict with Congress's recognition that Internet service providers and other online platforms should be able to provide content or restrict access to certain materials without fear of civil liability. *See* 47 U.S.C. § 230(c); *see also* Jeff Kosseff, *The Gradual Erosion of the Law that Shaped the Internet: Section 230's Evolution Over Two Decades*, 18 Colum. Sci. & Tech. L. Rev 1, 2 (2016) (Under Section 230 of the Communications Decency Act, 47 U.S.C. § 230, "websites, applications, Internet service providers (ISPs), social media companies, and other online service providers should not be held liable for defamation, invasion of privacy, and virtually any other lawsuit that arises from user-provided content."). The lower court's novel conclusion—*i.e.*, that a private entity becomes a state actor if a public official is involved in selecting that entity to disseminate publicly available content—undercuts this regime.

The risk of civil liability is not some abstract hypothetical for Internet service and content providers. Litigants regularly file claims against such providers, and they seek an expansive view of the state action and public forum doctrines. *See Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 456 (E.D. Pa. 1996) (holding that AOL is not a state actor and therefore plaintiff lacked a First Amendment right to send unsolicited email via AOL); *see also Green v. Am. Online, Inc.*, 318 F.3d 465, 472 (3d Cir. 2003) (holding that AOL is not "transformed into a state actor because AOL provides a connection to the Internet on which government and taxpayer-funded websites are found, and because AOL opens its network to the public whenever an AOL member accesses the Internet and receives email or other messages

from non-members of AOL"); *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018) (holding that YouTube is not a public forum); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631–32 (D. Del. 2007) (rejecting argument that a search engine is a state actor or a public forum).

Until now such claims have generally failed. The Second Circuit's ruling, however, gives them new life. In *Knight First Amendment Institute at Columbia University v. Trump*, for example, plaintiffs successfully argued that portions of Twitter—a privately operated social media platform—became a public forum when used by a public official. 302 F. Supp. 3d 541, 574–75 (S.D.N.Y. 2018). The district court's analysis relied in part on the decision below to conclude that, because the parties exercising control over the Twitter account at issue were public officials, it qualified as a public forum. *Id.* at 568.

This Court recently suggested that social media is akin to "the modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). It is quite another thing, however, to say that private persons operating such media are state actors. The Second Circuit's decision greatly expands the circumstances in which that conclusion will follow. The Court should take this opportunity to correct the significant error made by the Second Circuit and clear up the requirements for establishing state action and a public forum.

CONCLUSION

For the foregoing reasons, and those described by the Petitioners, the Court should grant the Petition.

Respectfully submitted,

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